

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FILED

APR 11 2016

CLERK

DAVID H. JOHNSTON,

* CIV 15-4126

Plaintiff,

*

vs.

ORDER

*

ROBERT DOOLEY, Warden,
Mike Durfee State Prison, in his
official and individual capacities;
DENNIS KAEMINGK, Secretary of
Corrections for the State of South Dakota,
in his official and individual capacities;
MARTY JACKLEY, Attorney General
for the State of South Dakota, in his
official and individual capacities;
LARRY LOVREN, Brown County
States Attorney, in his official and
individual capacities;
ED LIGHTENBERG, Director of the
Board of Pardons and Paroles in his
official and individual capacities;
BRAD LEWANDOWSKI, Parole Officer
for the South Dakota Board of
Pardons and Paroles in his official
and individual capacities; and
CHRIS GROSS, Police Detective for the
Aberdeen Police Department, in his
official and individual capacities;

Defendants.

*

Plaintiff David H. Johnston has requested that this case be held in abeyance pending the outcome of the case that he presently has pending in South Dakota Circuit Court in Brown County, South Dakota. The goal of the Brown County lawsuit is to meet the "favorable-termination" rule from *Heck v. Humphrey*, 512 U.S. 477 (1994). Meeting that rule is necessary for this case to proceed. As the record now stands, and as Judge Duffy observed in her Report and

Recommendation, the September 18, 2014 decision of the South Dakota Board of Pardons and Parole recognizing a three-year sentence computation error on a prior sentence is not the type of decision which meets the requirements of the favorable termination rule.

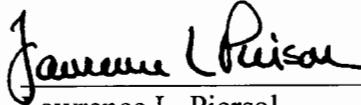
The Court does therefore adopt the Report and Recommendation with one exception. It is true that at this time Plaintiff Johnston's lawsuit does fail to state a cause of action. However, he is now making an attempt to meet the favorable termination rule. This Court will not hold this lawsuit in abeyance for however long it may be necessary to see what determination the South Dakota courts make. The request for holding this action in abeyance is denied. However, given the present attempt to meet the favorable-termination rule, this lawsuit is not considered to be a strike for purposes of the Prison Litigation Report Act, 28 U.S.C. § 1915(g). In all other respects, the Report and Recommendation is adopted.

IT IS ORDERED:

1. That the Magistrate Judge's Report and Recommendation, Doc. 7, is ADOPTED in part and denied in part.
2. That Plaintiff's Complaint, Doc. 1, is DISMISSED without prejudice for failure to state a claim upon which relief can be granted.
3. That Plaintiff is advised that the dismissal of this lawsuit will not be considered a "strike" for purposes of the Prison Litigation Reform Act. 28 U.S.C. § 1915(g).
4. That Plaintiff remains responsible for payment of the balance of the \$350.00 filing fee.

Dated this 11th day of April, 2016.

BY THE COURT:



Lawrence L. Piersol

United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

By: 

Deputy